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2 **So Ordered.**



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4
5 *Patricia C. Williams*
6 Patricia C. Williams
Bankruptcy Judge

7 **Dated: September 5th, 2013**

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10 UNITED STATES BANKRUPTCY COURT
11 EASTERN DISTRICT OF WASHINGTON

12 In re:

DC Case No. 11-cv-00357-RMP

13 LLS AMERICA, LLC, et al.,

Case No. 09-06194-PCW11

14 Debtor(s).

15 BRUCE P. KRIEGMAN, solely in his
16 capacity as court-appointed Chapter 11
17 Trustee for LLS America, LLC

Adversary No. 11-80299-PCW

18 Plaintiff(s),

19 vs.

MEMORANDUM DECISION RE:
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
ON CERTAIN SECTION 544(b)(1)
REQUIREMENTS AND
APPLICABLE REACH-BACK
PERIODS (ECF NO. 435)

20 MARK BIGELOW, et al.,

Defendant(s).

Introduction

Plaintiff seeks judgment as a matter of law that he has satisfied the requirements of 11 U.S.C. § 544(b)(1) such that he is entitled to seek avoidance and recovery of fraudulent transfers under RCW 19.40.41(a)(1) reaching back to 1997.

1 The facts pertinent to the numerous related adversary proceedings are lengthy
2 and involved and have been reiterated numerous times in prior memoranda issued by
3 this court. For the purposes of this partial summary judgment, the court bases its
4 opinion upon Plaintiff's LR 56 Statement of Undisputed Facts (ECF No. 436 filed
5 August 1, 2013), and the other pleadings filed in support of the motion (ECF Nos.
6 437, 438, 439, 440, 441, 485 and 486), as well as the objections filed by the defendants
7 (ECF Nos. 477 and 481).

8 I.

9 Discussion of Applicable Statute of Limitations

10 Plaintiff requests a legal determination that he is entitled to avoid and recover
11 all actual fraudulent transfers made by the debtor since 1997 pursuant to
12 RCW 19.40.041(a)(1) and RCW 19.40.091(a), as authorized under § 544(b)(1) of
13 Title 11 of the United States Code (the "Bankruptcy Code").

14 Trustees in bankruptcy court may avoid fraudulent transfers made by the debtor
15 within two years of the filing of the bankruptcy petition. 11 U.S.C. § 548. Trustees in
16 bankruptcy court also have "strong arm powers" under 11 U.S.C. § 544(b), which
17 authorizes trustees to avoid fraudulent transfers under state law. The term "strong arm
18 powers" refers to the fact that the trustee is authorized to avoid all fraudulent transfers
19 if there is a single unsecured creditor called a "triggering creditor," which, at the time
20 of the filing of the bankruptcy petition, could have avoided even one such transfer.

1 Additionally, any statute of limitation applicable to that triggering creditor is tolled
2 for two years after the appointment of the trustee. 11 U.S.C. § 546(a).

3 Section 544(b)(1) of the Bankruptcy Code provides that “the trustee may avoid
4 any transfer of an interest of the debtor in property . . . that is voidable under applicable
5 law by a creditor holding an unsecured claim that is allowable under section 502 of
6 this title” 11 U.S.C. § 544(b)(1). As a prerequisite to recovering under § 544(b):

7 [T]he trustee must show “that at least one of the present creditors of the
8 estate, holding an allowable claim, was an actual unsecured creditor or
9 the successor in interest of an actual unsecured creditor against whom
the transfer was fraudulent and voidable under the controlling state or
federal law.”

10 *In re Independent Clearing House Co.*, 77 B.R. 843, n.30 (D. Utah 1987), *quoting* 4
11 *Collier on Bankruptcy* ¶ 544.03(1) at 544-20 (L. King 15th ed. 1987). Plaintiff argues
12 that the existence of such a “triggering creditor” gives the trustee an unlimited right
13 to invoke state law avoidance powers, *citing In re Acequia, Inc.*, 34 F.3d 800, 809 (9th
14 Cir. 1994) and *In re Independent Clearing House Co.*, 77 B.R. at 863. Furthermore,
15 plaintiff asserts that under § 544(b)(1), the trustee stands in the shoes of the debtor
16 corporation’s unsecured creditors. *In re Agricultural Research & Tech. Group, Inc.*,
17 916 F.2d 528, 534 (9th Cir. 1990).

18 The existence of a § 544(b) cause of action depends upon whether or not a
19 creditor holds a viable claim against the debtor at the time the bankruptcy petition is
20 filed. *Acequia*, 34 F.3d at 807 (*quoting In re McDowell*, 87 B.R. 554, 558 (Bankr. S.D.

1 Ill. 1988). In these related adversary proceedings, it is undisputed that several
2 “triggering creditors” exist. The bankruptcy petition was filed on July 21, 2009. There
3 are several creditors who initially transferred funds to the debtor within one year of
4 the filing of the bankruptcy petition. Those creditors hold allowed unsecured claims.
5 Those creditors at the time of the bankruptcy filing held causes of action against the
6 debtor under state law, RCW 19.40, etc. [the Uniform Fraudulent Transfers Act
7 (UFTA)], as the statute of limitations had not expired as of the date of filing the
8 bankruptcy petition.

9 RCW 19.40.091(a) provides that a cause of action under RCW 19.40.041(a)(1)
10 (transfers made with the actual intent to hinder, delay or defraud creditors) shall be
11 extinguished “within four years after the transfer was made or the obligation was
12 incurred or, if later, within one year after the transfer or obligation was or could
13 reasonably have been discovered.” The Washington Supreme Court has interpreted
14 RCW 19.40.091(a) to provide “a one-year period from the date of discovery of the
15 fraudulent nature of the transfer within which to initiate a claim under the UFTA.”
16 *Freitag v. McGhie*, 133 Wn.2d 816, 824 (1997). The Washington Supreme Court
17 rejected the argument that the statute of limitations should begin to run when an
18 aggrieved creditor knew or should have known of the **existence** of the transfer rather
19 than when the aggrieved creditor knew or should have known of the **fraudulent**
20 **nature** of the transfer. *Id.* Therefore, a creditor can pursue state law claims for any

1 fraudulent transfer discovered or which reasonably should have been discovered if the
2 discovery occurred within one year of the bankruptcy petition, even though the
3 transfer occurred more than four years prior to the bankruptcy petition. Due to his
4 strong arm powers, the trustee holds the cause of action arising under RCW 19.40,
5 etc., and may seek to avoid all fraudulent transfers made by the debtor. *In re*
6 *Agricultural Research & Tech. Group, Inc.*, 916 F.2d at 534. Clearly, the triggering
7 creditors had the right to recover transfers occurring within four years prior to the
8 bankruptcy proceeding and thus the trustee holds a valid cause of action under §
9 544(b).

10 Under this statutory framework, the existence of a “triggering creditor”
11 under section 544(b) gives the trustee an unlimited right to invoke state-
law avoidance powers.

12 *In re Acequia, Inc.*, 34 F.3d at 809. The defendants do not dispute this conclusion.

13 The trustee argues that with respect to transfers made with the actual intent to
14 hinder, delay or defraud creditors, he is entitled to sue to avoid all such transfers made
15 since the debtor’s inception in 1997. The defendants disagree. Pursuant to the holding
16 in *Freitag*, an aggrieved party has a one-year period from the date of discovery on the
17 fraudulent nature of the transfer within which to initiate a claim under the UFTA.
18 Assuming that the triggering creditors discovered the fraudulent nature of the debtor’s
19 transfers immediately after becoming creditors by submitting their initial deposit to
20

1 debtor, the one-year discovery period to initiate a claim under RCW 19.40.091(a)
2 would not have expired prior to the petition date.

3 The dispute relating to this motion is whether the trustee, due to the “date of
4 discovery” language in RCW 19.40.091(a), can recover transfers which occurred
5 earlier than four years prior to the bankruptcy petition.

6 II.

7 Timeliness of the Plaintiff’s Motion

8 A preliminary matter to be addressed by the court is the timeliness of the
9 motion. The responses by defendants represented by Foster Pepper PLLC (ECF No.
10 477 filed August 21, 2013) and defendants Anne, David and Dean Stack (ECF No.
11 481 filed August 23, 2013) jointly assert that the plaintiff’s motion is untimely
12 pursuant to this court’s Amended Case Schedule Order Re Non-Common Issues (ECF
13 No. 219 filed on February 8, 2013) and the Second Amended Case Schedule Order Re
14 Non-Common Issues (ECF No. 469 filed on August 19, 2013).¹

15 The defendants argue that the scheduling orders contemplate that all dispositive
16 motions be filed by July 25, 2013. Plaintiff responds that August 1, 2013 was the
17 deadline set for non-dispositive motions. Arguing that this motion is a non-dispositive

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19 ¹ Defendant Cilwa filed a Motion to Strike (ECF No. 464) the plaintiff’s Motion
20 for Partial Summary Judgment on the same basis. He orally withdrew that Motion to
Strike at the hearing held on August 29, 2013.

1 motion, plaintiff maintains the filing on August 1, 2013 is timely. Plaintiff argues that
2 the motion relates to the reach-back period under § 544 and is not dispositive of any
3 particular claim against any particular defendant.

4 BLACK’S LAW DICTIONARY (9th ed. 2009), defines “dispositive” as “[b]eing a
5 deciding factor; (of a fact or factor) bringing about a final determination.” Plaintiff’s
6 partial summary judgment motion seeks a legal determination of the applicability of
7 the statute of limitations. It does not determine or decide any factual matter, nor does
8 it bring about a final determination as to the merits of any particular claim against any
9 particular defendant. However, the court concludes that the motion is a dispositive
10 motion as the resolution of the motion affects the legal rights of certain defendants.

11 Any ruling on the merits of this motion determines whether the defendants in
12 the related adversary proceedings have a defense to the plaintiff’s claim for recovery
13 of transfers occurring more than four years prior to the bankruptcy. A ruling of law
14 which establishes or nullifies a defense to a plaintiff’s right to recover under an
15 applicable statute of limitations is a dispositive motion.

16 **CONCLUSION**

17 The conclusion that the subject motion is a “dispositive” motion renders the
18 motion untimely under the scheduling orders. This court has historically enforced
19 deadlines in scheduling orders, and there are no circumstances in this situation to
20 justify an exception to the court’s usual practice. Also, due to the scheduled trial date

1 of the adversary involving some of the objecting defendants, it is inefficient to have
2 the merits of this issue considered both by this court and the District Court. Therefore,
3 the plaintiff's Motion for Partial Summary Judgment (ECF No. 435) is **STRICKEN**
4 and an order will be entered accordingly. The issue raised in the motion, i.e., the
5 applicability of the statute of limitations, will be determined by the District Court.²
6 As this does not constitute a ruling on the merits by this court, no report and
7 recommendation to the District Court will be entered. The parties should invoke
8 appropriate District Court procedures to obtain a resolution of the issue by that court.

9 ///END OF MEMORANDUM DECISION///
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16 ² The form of any ruling on the merits would be a report and recommendation to the
17 District Court. The District Court would then review the report and recommendation
18 and either agree or disagree with this court's decision regarding the merits of the issue.
19 Had the motion been filed timely, with the hearing on the motion occurring earlier,
20 that review possibly could have occurred immediately prior to the trial scheduled for
September 30, 2013. The week delay in filing the motion renders it impossible for the
District Court to review any report and recommendation regarding the merits of the
issue prior to the trial scheduled for September 30, 2013. *See* Fed. R. Bankr. P. 9033.